71-886

Supreme Court, U.S.
FILED
JAN 8 1972
E. ROBERT SEAVER, CLERK

NO._____

IN THE

Supreme Court of the United States

October Term, 1971

STRACHAN SHIPPING COMPANY, ET AL., *Petitioners*

v.

CITY OF GALVESTON, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

SWEENEY J. DOEHRING
THEODORE GOLLER
946 Bank of the Southwest Bldg.
Houston, Texas 77002 224-7870

Attorneys for Petitioners, Strachan Shipping Company and Texas Employers' Insurance Association

FULBRIGHT, CROOKER
& JAWORSKI
Of Counsel

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	8
Conclusion	16

AUTHORITIES

CASES	Page
Bisso v. Inland Waterways Corporation, 349 U.S. 85, 99 L.Ed. 911 (1955)	8, 9, 11
Boston & Main Railroad v. Piper, 246 U.S. 439, 62 L.Ed. 820 (1918)	13
Boston Metals Company v. The SS WINDING GULF, 349 U.S. 122, 99 L.Ed. 933 (1955)	11
Dixilyn Drilling Corporation v. Crescent Towing & Salvage Company, 372 U.S. 697, 10 L.Ed. 2d 78 (1963)	11
Express Co. v. Caldwell, 88 U.S. 264, 269-270, 22 L.Ed. 556, 558, 559 (1875)	10
Galveston Wharf Co. v. Galveston H. & S.A. Ry. Co., 285 U.S. 127, 76 L.Ed. 659 (1932)	8
Gulf, Colorado & Santa Fe Railway Company v. Deen, 158 Tex. 466, 312 S.W.2d 933 (Tex. Sup. 1958), cert. den. 358 U.S. 874, 3 L.Ed.2d 105	11
Port of Tacoma v. SS DUVAL, 364 F.2d 615 (9 Cir. 1966)	14
Railroad Co. v. Lockwood, 84 U.S. 357, 21 L.Ed. 627 (1873)	10

CASES

	Page
Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corporation, 350 U.S. 124, 100 L.Ed. 133 (1956)	15
Selden and Co. v. Trustees of Galveston Wharves, 7 F.M.C. 679 (1964)	9
Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411, 3 L.Ed.2d 1334 (1959)	11
Syracuse, The, 79 U.S. 167, 20 L.Ed. 382 (1871)	10

FEDERAL STATUTES AND REGULATIONS

46 U.S.C.A. §801	3
46 U.S.C.A. §816	3, 8
46 C.F.R. §533	8

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS

Tex. Const. Art. V, §6	11
Tex. Rev. Civ. Stat. Ann., Art. 1820 (1964)	11

NO. _____

IN THE

Supreme Court of the United States

October Term, 1971

STRACHAN SHIPPING COMPANY, ET AL, *Petitioners*

v.

CITY OF GALVESTON, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioners Strachan Shipping Company and Texas Employers' Insurance Association (hereinafter collectively called Strachan or Petitioners) respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Texas entered on the 28th day of July, 1971.

OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported in 14 Tex. Sup. Ct. J. 486 (July 31, 1971) and appears in the Appendix hereto (A. 1)[1]

1. Separate Appendix prepared and submitted jointly by petitioners C. V. Rorie, Jr., and Strachan Shipping Company.

The opinion of the Court of Civil Appeals, is reported in 456 S.W.2d 421 (14th Dist. Houston, 1970) and appears in the Appendix hereto (A. 13).

The judgment of the District Court of Galveston (56th Judicial District of Texas) was entered on August 28, 1968, and appears in the Appendix hereto (A. 28). No written opinion was rendered by that Court.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on July 28, 1971. Timely petitions for rehearing were denied on the 13th day of October, 1971, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1.

Whether the operator of a port terminal facility required by federal statute to observe just and reasonable regulations and practices in connection with the handling of goods in foreign commerce may lawfully shift liability for its own negligence to the user of its specialized cargo handling equipment by an exculpatory provision in its tariff purporting to make its general employee who operated such equipment the special servant of the user, where a jury expressly found that such general employee was not subject to the user's control and was not the user's loaned servant.

2.

Whether an exculpatory provision in a terminal operator's tariff filed with but not approved by the Federal

Maritime Commission is void and unenforceable where the Commission has expressly stated that acceptance of a tariff by the Commission does not constitute approval of its terms and that the exculpatory provision here sought to be reviewed is not a matter within its jurisdiction.

STATUTORY PROVISIONS INVOLVED

The Shipping Act of 1916, United States Code, Title 46:

§801. *Definitions*

When used in this chapter:

"The term 'other persons subject to this chapter' means any person not included in the term 'common carrier by water,' carrying on the business of . . . furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

§816. *Discriminatory rates prohibited; supervision by Board*

"Every . . . other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivery of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

STATEMENT OF THE CASE

This litigation was instituted in the 56th District Court of Galveston County, Texas, by C. V. Rorie, Jr., a longshoreman, to recover damages for personal injuries sustained on September 6, 1960, while working on board the SS ARMAGH at the Port of Galveston, Texas.

He sued Avenue Shipping Co., Ltd., the shipowner, Trinder Anderson & Co., Ltd., the charterer, (hereinafter collectively called shipowner) and the City of Galveston, its Mayor and the Board of Trustees of the Galveston Wharves, the owner and operator of the terminal facilities at the Port of Galveston (hereinafter collectively called City). He sought recovery against the shipowner on the grounds of unseaworthiness and/or negligence and against the City on the ground that his injuries were caused by the negligence of its general employee who was operating a shoreside crane used to discharge bulk ore from the hold of the vessel.

The shipowner and the City filed cross-actions against petitioner Strachan Shipping Company, the stevedore and Rorie's employer, seeking indemnity for any sums they might be required to pay to Rorie as a consequence of his suit. Strachan counterclaimed against both defendants, and its workmen's compensation insurance carrier, petitioner Texas Employers' Insurance Association, intervened to recover compensation and medical payments made to Rorie as a consequence of his injuries on the ship.

Rorie's suit was dismissed for want of prosecution by the trial judge in May, 1966, but was reinstated on appeal and the case proceeded to trial before a jury during April-May, 1968.

The evidence was undisputed at the trial that to discharge the bulk ore Strachan arranged for the use of a mobile railway crane, referred to in the evidence and opinions below as the Hoist, The Brown Hoist or Brown Hoist No. 8, which was owned by the City. In addition to supplying the Hoist, the City supplied an operator (McPeters), and an oiler (Ermis), both of whom were general employees of the City. A supervisor employed by

the City was also present on the wharf in the vicinity of the vessel.

The City contended at the trial that the employment status of the Hoist operator was governed by Galveston Wharves Tariff Circular No. 4-B, which provided in Item 97, as follows:

> "When cranes, derricks, hoists, conveyors, lift trucks, trucks, tractors, etc., are rented or leased to others, it is expressly understood that the unit will be operated under the direction and control of the lessee and the lessee shall be responsible for the operation thereof, and the lessee assumes all risks for injuries or damages which may arise or grow out of the use or operation of said unit.
>
> "It is hereby understood and agreed that in the event lessee uses the operator of said unit employed by the Galveston Wharves, such operator shall be under the direction of the lessee and the operator shall be considered as the agent or servant of the lessee and lessee shall be responsible for the acts of such operator during the time of rental or lease. It is incumbent upon the lessee to make a thorough inspection and satisfy himself as to the physical condition and capacity of the unit, as well as the competency of the operator, there being no representation or warranties with reference to such matters."

This provision of the City's tariff was admitted into evidence over this petitioner's objections and was considered by the jury in its deliberations (A. 117-121, 143-144).

The jury returned a verdict finding that Rorie's injuries were caused by the negligence of the operator of the Hoist, and awarded damages of $75,000. The jury also found

that the shipowner was not liable to Rorie for unseaworthiness or negligence and in response to two separate special issues (Nos. 18 and 25) found further that Strachan Shipping Company, the stevedore, did not have the right to direct or control the operator of the Hoist, and that the operator was not Strachan's special or loaned employee (A. 34, 36).

The trial judge disregarded the express findings of the jury that the Hoist operator was not a borrowed servant of the stevedore and entered judgment *non obstante veredicto* on motion of the City that Rorie take nothing from the defendants (the City and the shipowner), and that the shipowner recover from Strachan the sum of $7,500 for attorneys' fees and disbursements incurred in the successful defense of Rorie's suit. All other relief was denied.

The Court of Civil Appeals reversed the judgment of the trial court, and held that the jury's answers to the special issues relating to the loaned servant question were fully supported by the evidence, and that the provisions of the tariff promulgated by the City were not controlling on that issue where the evidence showed that control over the Hoist operator was in fact retained by the City, his general employer.

Nevertheless, the Court of Civil Appeals remanded the case for another trial on the ground that the special issues (interrogatories) by which the jury found that the hoist operator's negligence was a proximate cause of Rorie's injuries constituted a "global submission" under Texas practice.

The Supreme Court of Texas reversed the decision of the Court of Civil Appeals, reinstated the judgment of

the trial court, and held as a matter of law that the exculpatory provision in the City's tariff constituted an agreement of the parties making the Hoist operator the special servant of Strachan Shipping Company, the user of the Hoist.

The Federal Maritime Commission filed a brief *amicus curiae* in the Supreme Court of Texas in which it contended that the Court of Civil Appeals was in error to the extent it implied that the unilaterally established tariff of a terminal operator must be approved by the Commission prior to the time it may lawfully be effectuated. However, the Commission in its brief stated specifically that it took no position with respect to the liability of the City for the injury here involved, since actions for the recovery of damages for personal injuries fall outside of the agency's jurisdiction and do not present any factual questions which require the exercise of its specialized knowledge.

Petitioner raised the federal questions here sought to be reviewed in its First Amended Answer to Cross-action of Defendant City of Galveston and Cross-action of Strachan Shipping Company filed in the trial court by special exceptions to the City's cross-action and as an affirmative defense (A. 75, 77) and also by objection to admission of the tariff provision into evidence (A. 119, 121, 143).

The federal questions were raised by Petitioner in the Court of Civil Appeals by Point No. 3 (and inferentially by Points 1 and 2) in the Brief of Appellant Strachan Shipping Company and by the Reply Brief of Appellant Strachan Shipping Company.

The federal questions were raised in the Supreme Court of Texas by Petitioner's Motion for Rehearing, after that

Court reversed the judgment of the Court of Civil Appeals which had held that the tariff provision was not controlling on the loaned servant issue.

REASONS FOR GRANTING THE WRIT

1.

The Decision Below Decides a Federal Question of Substance Contrary to Applicable Decisions of This Court.

The decision below holding that the operator of a terminal facility (required by federal statute to observe just and reasonable practices relating to the handling of cargo moving in foreign and interstate commerce) may by a unilateral declaration in its tariff shift liability for its own negligence to the users of its specialized cargo-handling equipment is in direct conflict with the decision of this Court in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 99 L.Ed. 911 (1955).

The issues presented by this case are of fundamental importance to the administration of the Shipping Act of 1916 relating to the operation of terminal facilities in the ports of the United States. The effect of the decision is to permit a terminal operator required by federal statute to observe just and reasonable regulations relating to the handling of property,[2] which has been held by this Court to be a common carrier with attendant responsibilities and obligations to the public which it serves,[3] and which is subject to supervision and control by a federal regulatory

2. 46 U.S.C.A. §816; 46 C.F.R. 533.

3. *Galveston Wharf Co. v. Galveston H. & S.A. Ry. Co.*, 285 U.S. 127, 76 L.Ed. 659 (1932).

agency empowered to enforce the statute requiring such regulations,[4] to exercise its monopolistic powers over the users of its facilities in a manner which is contrary to the judicially declared public policy of the United States and imposes an undue burden upon foreign and interstate commerce.

The court below held that the exculpatory provision of the tariff of the City of Galveston constituted an express agreement between the City of Galveston and Strachan that the latter should have the right to control the operator of the Hoist. Despite express findings of the jury (A. 34, 36) that in fact (1) Strachan did not have the right to control the City's general employee, and (2) that he did not become the borrowed servant of Strachan, the court held that the tariff provision was binding upon persons dealing with the City, and that ". . . [I]n these circumstances the tariff is conclusive, and McPeters was the loaned employee of Strachan as a matter of law."

The decision below is contrary to this Court's holding in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 99 L.Ed. 911 (1955), that similar provisions in a towage contract between the owners of a tugboat and a barge damaged by the negligence of the tug's crew, which provided that the towing movement should be at the sole risk of the towed barge, and that the crew of the tugboat in the performance of said service should become and be the servants of the barge, were against public policy and therefore invalid and unenforceable.

Mr. Justice Black, writing for the majority noted that a release-from-liability clause in a towage contract was

4. *Selden and Co. v. Trustees of Galveston Wharves*, 7 F.M.C. 679 (1964).

held invalid by this Court in 1871 in *The Syracuse*, 79 U.S. 167, 20 L.Ed. 382 (1871), which was decided "in an era of manifest judicial hostility toward release-from-negligence contracts particularly those made by businesses dealing widely with the public and having potential monopolistic powers", and that such hostility had caused the Court to declare that public policy forbade common carriers[5] and telegraph companies[6] to make such contracts.

Speaking of the second clause in the contract, that the employees of the tugboat should be the servants of the barge, which is, in effect, identical to the similar provision in the City's tariff here, the Court said, at 349 U.S. 94:

> "The second clause . . . likewise cannot be enforced. For if valid, the only effect of that clause would be to shift all liability for negligent towage from the towboat to the vessel being towed, precisely what the first clause attempted to do. This is true because employees of a towboat do not become employees of a vessel being towed just because a contract says so, when as here the workers are in truth and in fact solely employees of the towboat. . . . The rule against contractual exemption of a towboat from responsibility for its own negligence cannot be defeated by the simple expedient of providing in a contract that all employees of a towboat shall be the employees of the towed vessel when the latter 'employment' is purely a fiction."

The quoted language is particularly applicable under the circumstances of this case where after more than two weeks of trial the jury found as a fact upon ample evi-

5. *Railroad Co. v. Lockwood*, 84 U.S. 357, 21 L.Ed. 627 (1873).

6. *Express Co. v. Caldwell*, 88 U.S. 264, 269-270, 22 L.Ed. 556, 558, 559 (1875).

dence (as noted by the Court of Civil Appeals, the final arbiter of questions of fact under Texas practice[7]) that Strachan had no right of control over the City's Hoist operator, and that he was not Strachan's loaned servant. To paraphrase Mr. Justice Black, the jury found here that the " 'employment' is purely a fiction."

Accord *Boston Metals Company v. The SS WINDING GULF*, 349 U.S. 122, 99 L.Ed. 933 (1955) and *Dixilyn Drilling Corporation v. Crescent Towing & Salvage Company*, 372 U.S. 697, 10 L.Ed.2d 78 (1963).

In *Dixilyn* this Court held invalid a provision of a towage contract purporting to make a barge owner liable for all damages arising out of the towage as an attempt by the tower to exempt itself from liability for its own negligence and squarely in conflict with *Bisso*. The language of Mr. Justice Harlan, concurring, is appropriate here:

> ". . . Certainty in the law governing commercial transactions of this kind is an overriding consideration which will not be promoted by opening the Bisso rule to indeterminate exceptions in instances where, unlike Southwestern Sugar,[8] no functions of a regulatory agency are involved."

Petitioner respectfully submits that under the circumstances of this case where the jury found that the alleged employment was fictional rather than factual, and where the evidence also showed conclusively that the City was

---

7. Tex. Const. Art. V, §6; Tex. Rev. Civ. Stat. Ann., Art. 1820 (1964); *Gulf, Colorado & Santa Fe Railway Company v. Deen*, 158 Tex. 466, 312 S.W.2d 933 (Tex. Sup. 1958), cert. den. 358 U.S. 874, 3 L.Ed.2d 105.

8. *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 3 L.Ed.2d 1334 (1959).

one of those "businesses dealing widely with the public and having potentially monopolistic powers", the court below erred in failing to hold that the exculpatory provision of the City's tariff was invalid and unenforceable and the writ here sought should issue to correct this manifest error.

2.

The Decision Below Is In Conflict With The Position of the Federal Agency Designated By Statute To Enforce Just and Reasonable Regulations In This Field.

The holding of the court below that it was the view of the Federal Maritime Commission that a tariff of a terminal operator becomes effective upon filing misinterprets the Commission's position in its brief *amicus curiae* in that court. While the Commission did say that tariffs of terminal operators *may* be effectuated without the necessity of its approval, it also said that,

> ". . . The mere acceptance of a tariff does not constitute a determination that the tariff is in all respects lawful . . ."
>
> "Acceptance of a tariff by the Commission does not constitute approval of the terms contained therein. . . ."
>
> "The Federal Maritime Commission takes no position with respect to the liability of the City for the injury here involved, since actions for the recovery of damages for personal injuries like that involved here fall outside of this agency's jurisdiction, and this proceeding does not appear to present any factual questions which require the exercise of its special knowledge."

Thus, the Commission did not take the position in the court below that the exculpatory provision in the City's tariff here in issue became effective upon filing, but instead took the opposite view that filing did not make such provision lawful and expressly declined jurisdiction over this controversy.

This view is in accord with settled law that provisions not required by law to be included in tariffs, bills of lading and other similar documents filed with regulatory agencies do not become lawful simply because they are inserted in such documents, and that filing of such provisions does not constitute notice to anyone of the matters contained therein.

This Court has previously held in an analogous situation that illegal conditions in a tariff cannot be enforced. In *Boston & Main Railroad v. Piper,* 246 U.S. 439, 62 L.Ed 820 (1918), the railroad's bills of lading contained a provision limiting the carrier's liability for unusual delay and detention, caused by its negligence, to the amount actually expended by the shipper of cattle for the purchase of food and water for the cattle while so detained. The Court held that the provision contravened the principle that a carrier may not exonerate itself from its own negligence, and that even though the provision was in the bill of lading which was filed with the carrier's tariffs with the Interstate Commerce Commission, it gained nothing from that fact. The Court said:

> "The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed by that body . . . *but not so of conditions and limitations which are, as is this one, illegal, and consequently void.*" (Emphasis supplied.)

The quoted language is particularly applicable here where the Federal Maritime Commission, the agency designated by statute to regulate and supervise operation of terminal facilities in foreign commerce, has taken the position that acceptance of a tariff for filing does not constitute approval of its terms or a determination that such terms are lawful, and that it has no jurisdiction to determine the validity of the provision here in question relating to the "loaned servant" issue and the City's liability for the plaintiff's injuries.

Nor can the filing by the City of the illegal provisions of Item 97 of its tariff with the Federal Maritime Commission be deemed to be notice of such provisions to Strachan under settled federal decisional law. In *Port of Tacoma v. SS DUVAL*, 364 F.2d 615 (9 Cir. 1966), the Port published a tariff (pursuant to the Shipping Act of 1916, 46 U.S.C. §§801-842) which provided in effect that the anti-lien provisions of any agreement or charter party purporting to prohibit the charterer from incurring maritime liens against a vessel under its control would not relieve the vessel from *in rem* liability for wharfage charges due the Port.

The Port contended that the tariff gave constructive notice to the shipowner and made the no-lien provisions of the charter party ineffectual. The Court of Appeals disagreed, saying at page 617:

> ". . . It is settled, however, that such filing gives constructive notice only ' * * * of everything contained in such published tariff schedules which is by law required to be inserted therein * * *.' *Pacific SS Co. v. Cackette*, 9 Cir., 1925, 8 F.2d 259, 260, cert. denied, 269 U.S. 596, 46 S.Ct. 203, 70 L.Ed.

> 426. We can find no such requirement of law as to the provisions of the tariff that purport to give the Port a lien valid against the owner in spite of the no lien provisions of the charter party."

Certainly, if a tariff provision purporting to render ineffectual the anti-lien clause in a charter party is unlawful, the release-from-negligence clause in the City's tariff here is presumptively invalid as a matter of law and cannot form the basis of the judgment of the court below exonerating the City from the negligent conduct of its Hoist operator and making this petitioner responsible for indemnifying the shipowner for its expenses of defending Rorie's suit.

(The Supreme Court of Texas held that the judgment in favor of the shipowner against Strachan for indemnity was proper because the *jury* found that Rorie's injuries were caused by the negligence of the hoist operator, whose negligence the *court* found constituted a breach of Strachan's implied warranty of workmanlike service under *Ryan*.[9] This holding effectively overrules the holding of the Court of Civil Appeals that the jury issues relating to the operator's negligence constituted a "global submission" under Texas practice. These issues being legally sufficient to establish the ship's action for indemnity against the stevedore, they must likewise be sufficient to support the plaintiff's action against the City, Strachan's counterclaim against the City and the claim of Texas Employers' Insurance Association for reimbursement of its compensation and medical payments.)

---

9. *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corporation*, 350 U.S. 124, 100 L.Ed. 133 (1956).

CONCLUSION

For these reasons, a writ of certiorari should be granted to review the decision and judgment of the Supreme Court of Texas.

Respectfully submitted,

SWEENEY J. DOEHRING
947 Bank of the Southwest Bldg.
Houston, Texas 77002 224-7070

THEODORE GOLLER
946 Bank of the Southwest Bldg.
Houston, Texas 77002 224-7070

Attorneys for Petitioners, Strachan Shipping Company and Texas Employers' Insurance Association

FULBRIGHT, CROOKER
& JAWORSKI
Of Counsel